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10 WIPO, Copyright and Libraries

Abstract: The World Intellectual Property Organization (WIPO), based in Geneva, represents the primary forum for intellectual property (IP) governance at the global level. WIPO is the custodian of key international treaties focused on different aspects of IP, provides a forum for intergovernmental discussion and exchange, and constitutes a source of guidance and support for members. It plays a significant role in copyright law and practice. WIPO’s Standing Committee on Copyright and Related Rights (SCCR) was set up in 1998–9 to examine matters of substantive law or harmonisation in the field of copyright and related rights. Libraries have been officially on the agenda of WIPO for some years, particularly as part of broader discussions about limitations and exceptions to copyright. This chapter seeks to provide the reader with an overview of WIPO and the engagement of libraries at there alongside partner stakeholders in favour of reform. The chapter presents background on WIPO, including its organisation and roles; addresses the history of its work around limitations and exceptions to copyright for the benefit of libraries and their users; examines the positions taken by different stakeholders; and reviews alternatives for pursuing more effective copyright laws for libraries.

Keywords: Copyright; Intellectual property (International law); Fair use (Copyright)

Introduction

The World Intellectual Property Organization (WIPO) was established in Geneva in 1970 following the WIPO Convention of 1967 to ensure cooperation between the different Unions of Member States who had signed the 1883 Paris Convention for the Protection of Industrial Property, the 1886 Berne Convention for the Protection of Literary and Artistic Works and the 1891 Madrid Agreement Concerning the International Registration of Marks (WIPO n.d.a). In 1974, WIPO became an agency of the United Nations (UN) and currently has 193 Member States.

WIPO is a venue for developing and securing agreement on international treaties on aspects of Intellectual Property (IP) and monitoring their implementation. It plays a key role in determining parameters and minimum standards for national laws and practices and provides an important space for discussion and exchange between national governments and agencies, helping to spread ideas and norms around the world and providing a focus for lobbying. WIPO is a source of guidance and support for its members, both in crafting national laws, and in
developing infrastructure. It offers practical services for registering some forms of IP, such as patents and trademarks and has an important place in any consideration both of the copyright laws and practices that affect libraries’ ability to carry out their missions today and any improvement strategies.

This chapter discusses WIPO’s role and focuses on the work of the Standing Committee on Copyright and Related Rights (SCCR). It begins with an exploration of the arguments around legal action at the international level in general, and at WIPO in particular, before turning to discussions on limitations and exceptions to copyright (L&Es). It closes with reflection on the work with WIPO in the context of efforts to develop copyright frameworks appropriate for the effective operation of libraries.

Libraries have been officially on the agenda of SCCR for fifteen years, as part of broader discussions about limitations and exceptions. Libraries have argued that there is a need for reform to support education, research and access to culture in a digital age; and that an international WIPO legal instrument is necessary to achieve appropriate reform. Through working at WIPO, libraries have engaged directly with governments, raising awareness of the needs and interests of libraries and their users when it comes to making copyright policy. The potential to influence government is a valuable outcome in itself, complementing the work of library advocates nationally.

International Copyright Reform: Whether and How to Act?

Uniform Minimum Rights, Uneven Exceptions

An international dimension is present both in the copyright laws with which libraries work currently, and in efforts to achieve change in the future. International guidelines and legislation can create both floors with minimum protections, and ceilings with upper limitations on how far copyright can go in limiting people’s ability to carry out activities without needing to seek permission or pay remuneration (Australia. Productivity Commission 2017). A key concern for libraries, along with other representatives of users and the institutions that serve them, is that floors tend to be harder than ceilings. If international law focuses on setting out the minimum rights that rightsholders should enjoy rather than on exceptions or limitations which place safeguards around exclusive rights, it might lead to situations where libraries and others are unable to fulfil their public interest missions.
The **Berne Convention**, for example, mandates an exception only for quotations, but leaves exceptions for other uses, such as for teaching, or reporting the news of the day, to the discretion of national legislation. Arguably, provisions for exceptions have grown weaker over time, with the original Convention providing broader possibilities than subsequent ones (Berne Convention 1886; WIPO 1886; WIPO 1979). There are situations in which the obligations of national governments concerning rights are relatively clear, but those related to L&Es are not. Governments may be tempted, or pressured, to offer less generous provisions for libraries, archives, educators, researchers and wider use than they would otherwise, for fear of facing legal action or criticism, as has been the case in South Africa recently (IFLA 2019a).

The result is that significant differences in L&Es exist in law from one country to the next. The International Federation of Library Associations and Institutions’ (IFLA) analysis of the limitations and exceptions to copyright for libraries and archives covered in Professor Kenneth Crews’ 2017 study for WIPO (Crews 2017) found that while 72% of countries have a preservation exception, barely 30% have one that is adapted for digitisation (IFLA 2019b). The situation is worse for internal library uses. Only 30% of countries have any exception at all, and only 20% allow for digital uses (IFLA 2019b, 2).

There are strong disparities in L&Es between regions, with richer areas tending to have more developed systems (IFLA 2019b). In practical terms, libraries and their users in one country may have greater possibilities to draw on L&Es to fulfil their missions than libraries and their users elsewhere. The inconsistency creates a risk of deepening divisions; key activities that enhance growth potential, such as education and research, are legally permitted and simpler to carry out in wealthier countries than in poorer ones (IFLA 2019b). A key argument for working at the international level is to bring about minimum standards for L&Es everywhere, to ensure that all libraries and their users enjoy a core set of options under copyright law to fulfil their missions without needing to seek permission, or pay remuneration.

### The Case for Acting Internationally

Many suggest that appropriate outcomes could be achieved without international action, given the option open for national governments to introduce L&Es (EIFL 2019; George 2019, to give just two examples). However, advocates for copyright reform note the slow pace of national change, and point to the evidence of the **Marrakesh Treaty** which proved that an international instrument can provide a powerful incentive for reform (IFLA 2020). Furthermore, international action is
essential in the effort to ensure that libraries, archives, museums, educators and researchers, and other beneficiaries of L&Es can make use of them across borders. Without a guarantee of the ability to work easily with colleagues elsewhere, and faced with inconsistencies between national provisions, library and information professionals often encounter blockages and uncertainty, for example in preservation networks which bring together institutions from different countries to share digitisation equipment and expertise, something that is especially important for countries facing the risk of climate change-related damage, or for cross-border document supply, or for the development and sharing of materials for distance education. The collected statements of library representatives at WIPO meetings identify further issues (EIFL 2016a).

Beyond the impulsion that the Marrakesh Treaty has provided for national reform, the Treaty offers an important reference point for reflecting on the shape of potential international actions in general. The reasons behind the bid for change are familiar. Prior to the Treaty’s agreement, exceptions permitting the making and sharing of copies of works for persons with print disabilities, perceived both as a human right and a public good, had been far from universal; potential beneficiaries were forced to rely on seeking permissions or market responses to their needs. The market failed to meet the demand, leading to the book famine (World Blind Union, 2021). Similar challenges are evident in relation to the ability of libraries to deliver on other public interest goals, such as preservation, and supporting research and education.

In addition, the Treaty has created a precedent for recognising the unique nature and character of libraries; they are clearly targeted by inclusion in the concept of authorised entities with a public interest mission, and are assigned the ability to make and share copies. Libraries are acknowledged as having a key role in responding to needs and delivering on rights to information, education and culture, in situations like preservation where the market is unlikely to provide solutions, or where the charging of fees could lead to the exclusion of many users. Finally, the Treaty explicitly addresses the question of how to enable the use of L&Es across borders, facilitates international cooperation and thereby enhances the ability of libraries to carry out their missions more effectively.

**Positions Taken by Libraries and Others**

Libraries, represented by IFLA, Electronic Information for Libraries (EIFL), and engaged national library associations, such as the Canadian and German library associations, have worked alongside counterparts from the archives and museums sectors, including the International Council on Archives (ICA)
and the International Council of Museums (ICOM) along with teachers’ unions, academics and think tanks engaged in promoting rights for education and research, such as Education International, Communia, the American University Washington College of Law, Wikimedia Deutschland, Knowledge Exchange Institute (KEI), the Centre for Internet and Society, Corporación Innovarte, and the Karisma Foundation.

The long-term goal for reform is to ensure that libraries and their users everywhere benefit from a basic set of L&Es to copyright, and are able to work with colleagues across borders. Change in international law is seen as the optimal way to provide an impetus for national reform, and a positive alternative to the patchwork of national laws and bilateral and plurilateral trade agreements. Currently, librarians working across borders deal with intense complexity in establishing what they can and cannot do. An appropriate legal instrument would provide a basis for international preservation networks to share in-copyright works between countries, drawing on specialised equipment and skills, as well as maintaining copies in different places to minimise the risk of loss. It would provide a solid basis for providing access to items in library collections for the benefit of researchers and learners who are unable to travel.

Library, archive and museum organisations are calling for an instrument focusing on preservation and access to preserved content with particular action being taken by IFLA. The approach takes a narrower focus than previous proposals, but responds to an identified priority by Member States in the face of climate change, and would support education and research activities. Organisations working on education and research meanwhile argue that rights to use works for such purposes should not be limited to particular institutions, but apply also to the uses themselves, regardless of the context, reflecting that much learning and research takes place outside formal settings. A proposed Treaty on Education and Research Activities sets out long-term goals, with efforts to extend education rights into the digital sphere, and to enable cross-border uses as immediate priorities (Infojustice n.d.). The emphasis is that such changes would not and should not lead to unjustified harm to the legitimate interests of rightsholders.

The goals of reform are not shared universally. There is consistent opposition from organisations representing rightsholders and from some governments to any form of binding international action, as well as wider warnings about the expansion of unremunerated L&Es, for example as voiced at the thirteenth session of the WIPO Standing Committee on Copyright and Related Rights (WIPO SCCR 2005a, 12 para 32). Arguments opposing action on L&Es have focused on concern about their perceived over-extension and a claimed impact on commercial exploitation of works. For authors, publishers and collecting societies alike, any use of a work which is unremunerated may appear to be seen as a lost
sale or licensing fee. Such views might be considered reductive and misguided and do not take into account the role of libraries as drivers of future sales; the broader social value that comes from activities taking place under L&Es, including the fulfilment of human rights; or the fact that many users simply cannot afford to pay fees. It may well be that perceptions of the extent of L&Es sought by user groups and the potential impact on markets are inaccurate, with rightsholder organisations fearing something far more dramatic than would occur in reality (Flynn 2019).

The argument is frequently made at WIPO that licensing schemes can be established to enable uses that would otherwise be too complicated if it were necessary to seek authorisation from individual rightsholders each time. The claim extends to cross-border uses, with suggestions that cooperation between collecting societies can facilitate the receipt of all necessary authorisations. There are significant questions with this approach, given both the under-development of the infrastructure for collective management, even in developed regions (IFLA 2018a), and the fact that many works, in particular those which are orphan, or were never produced for commercial purposes, are unsuited for licensing (IFLA 2018b). Similarly, it can be argued that some activities are essential for delivering on human rights and public interest goals, and should not be left to the market.

Beyond the discussion about whether L&Es should be remunerated or not, a major concern with an international legal instrument for some is the perceived likelihood that any move would create instability, opening up copyright laws in many countries around the world. Such instability is a particular worry for industries that rely on copyright, although there are differing views as to the extent of the costs of L&Es to rightsholders. The concern may have its roots in the broader issue about the future evolution of copyright industries in the face of technological change, and in particular the potential for rightsholders to recoup investments. Some WIPO Member States aware of the complexity of changing domestic law would prefer to avoid any outcome that could oblige them to do so. At least at WIPO’s SCCR, there are no proposals on the table that justify the concerns. Before examining how discussions are playing out at WIPO, WIPO and its operations are discussed.
At the Heart of it All: What is WIPO, and How Does It Work?

WIPO’s Role and Functions

The role of WIPO today, as set out in its Convention, agreed in 1967 and updated in 1979, is to promote the protection of intellectual property through cooperation among Member States. Further functions set out in the WIPO Convention include promoting the development of measures designed to facilitate the efficient protection of intellectual property, harmonise national legislation in the field, encourage the conclusion of new international agreements, provide legal and technical assistance to members, carry out studies, and provide IP services, including registration. The Organization proclaims on its website: “By striking the right balance between the interests of innovators and the wider public interest, the IP system aims to foster an environment in which creativity and innovation can flourish”.

In terms of WIPO’s day-to-day operations, a significant component of work effort goes toward providing IP services, and in particular patent and trademark registrations. A general set of treaties, the Global Protection System, allows for the recognition of different types of intellectual property at the international level, avoiding the need for IP owners to register in each jurisdiction (WIPO n.d.b). The most prominent example is the Patent Cooperation Treaty; but other instruments focus on trademarks, industrial designs, and appellations of origin. The treaties facilitate the recognition and protection of intellectual property rights internationally, in exchange for a fee. Given that the lack of any registration obligation represents a key tenet of international copyright law, there is no scheme for registering or revenue receipt included in relation to copyright. A further general group of four treaties on Classification sets out rules on what to include in published information about registrations, in order to allow for improved cooperation across jurisdictions.

A key area of focus for WIPO is capacity building. Member States may ask for advice on IP reforms as well as on how to run IP systems. WIPO produces tools and support for the administration of intellectual property offices, as well as the development of collective management organisations to manage copyright licensing. A key focus of capacity building work is the implementation of WIPO’s existing Treaties. A first key step, as with any Treaty, is that Member States need formally to ratify or accede to the Treaty, although in the case of EU Members, ratification of Treaties takes place as a bloc.
Furthermore, unless international law is directly applicable, it is important for governments to adapt national legislation to the requirements of a Treaty, to give certainty to individuals and organisations. WIPO’s support often therefore focuses on the design of legislative reforms. Much of the capacity building work is confidential, shaped around the demands of the countries receiving support, and it can be difficult to understand what is being promoted. Occasionally, insights appear, for example, when WIPO makes comments or recommendations on draft laws (Band 2020a). Historically, a draft model law on L&Es was developed with the WIPO Draft Law on Copyright and Related Rights, providing greater transparency about what was being promoted, but the draft has since disappeared from the internet (EIFL 2016b, 8).

WIPO is also a producer of research and reflection on issues associated with IP and generates statistics and indexes on particular topics like innovation. It has a growing emphasis on understanding the economics of IP, developing texts and other resources that may be used as references. It produces guides and explanatory documents commissioned from experts, for example on managing intellectual property for museums (Pantalony 2013). Finally, and most significantly for this chapter, there is WIPO’s normative work, most publicly focused on supporting discussions around potential future international treaties. In addition to work on L&Es, other areas of focus include potential instruments on design including a Design Law Treaty (WIPO SCT 2016), new rights for broadcasters, and genetic resources; traditional knowledge; and traditional cultural expression.

Work on developing new treaties is complicated by the fact that the treaties need to be passed unanimously. Any Member State has a potential veto although in reality it tends to be only the larger Member States or blocs who feel able to oppose the will of all others. To maintain momentum and facilitate reform in the absence of international agreements, one response has been to take an alternative approach through the development of model laws or similar instruments which might potentially serve as substitutes for formal agreements. WIPO has also sought to promote initiatives that aim to provide voluntary solutions to lessen the impact of identified challenges. For example, the Accessible Books Consortium was launched ahead of the agreement of the Marrakesh Treaty (WIPO Magazine 2015), although it is questionable whether such initiatives can substitute for legal action.

While WIPO can pass treaties, it does not have a means of enforcing them along the lines of the World Trade Organization (WTO) dispute settlement mechanism, or the Court of Justice of the EU. However, WIPO Treaties are often incorporated into trade deals, or used as reference points in wider efforts to influence legislation. Depending on provisions within countries, international law may be
cited in litigation within countries, for example to hold a government accountable for not implementing the terms of WIPO Treaties.

**Key Actors and Fora within WIPO**

The key formal **decision-making bodies** in WIPO are its **assemblies** with the General Assembly bringing together the **Member States**, along with the **Assemblies** of the members of the different Unions, with for example, the **Berne Union** (International Union for the Protection of Literary and Artistic Works) bringing together the signatories of the Berne Convention. The General Assembly takes decisions on the Organization’s programme of work and budget, appoints its Director General, and gives direction to its committees. The programme of work and the budget set out areas where the Secretariat will be active, including research and capacity building activities. Throughout the year, WIPO’s **Coordination Committee** prepares key decisions and can approve some, such as the appointment of senior staff. The **composition of the Coordination Committee** is determined every two years with an emphasis on geographical balance and incorporates Member States from other bodies including the Executive Committees of the Paris and Berne Unions along with others. It currently comprises 83 countries.

The most prominent part of WIPO for libraries is its **Standing Committee on Copyright and Related rights (SCCR)**, which is one of four standing committees addressing specific questions, including the creation of new international agreements. The SCCR was set up in 1998 to examine matters of substantive law or harmonisation in the field of copyright and related rights. Apart from the SCCR, other standing committees focus on patents, trademarks, including industrial designs and geographical indications, and standards. In general, Standing Committees work to support coordination and provide guidance, and can, if Member States agree, focus on normative work, as is the case with SCCR, which has both a draft treaty on broadcasting, and work towards an instrument of some sort on limitations and exceptions on the agenda.

In addition to the Standing Committees, the General Assembly and other governing bodies can establish permanent committees to address issues on an ongoing basis, such as WIPO’s **Program and Budget Committee** (PBC), its **Committee on Development and Intellectual Property** (CDIP), the **Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore** (IGC), and the **Advisory Committee on Enforcement** (ACE). Each Committee is chaired by a representative of a Member State, with the WIPO Secretariat providing support. The CDIP has a mandate to implement WIPO’s **Development Agenda**, which seeks to ensure that development concerns are central to
the Organization’s work. It focuses on projects requested by Member States, as well as some thematic discussions, but arguably has not led to a new focus on development issues in SCCR or elsewhere. The IGC is currently discussing draft texts on legal instruments around the protection of genetic resources, traditional knowledge and folklore. The work of SCCR is explored further below.

All WIPO Member States have the right to attend committee meetings, along with organisations recognised as observers, with observer status requiring the approval of Member States. In reality, not all Member States will attend every meeting; many countries send generalist staff from their Permanent Missions to the United Nations in Geneva, meaning that attendees at WIPO meetings might not have specialist knowledge on topics being discussed, although they do have a stronger sense of the broader political landscape across the UN system. Guidance for positions and views might emerge from a variety of sources, such as national IP offices, ministries of economy, justice, culture or foreign affairs, or even from within Geneva teams themselves. This can have an impact on the positions eventually taken.

Work on copyright at WIPO might involve a mixture of delegates from home country national governments with more subject expertise, and those based in Geneva who have a stronger vision of work across the board and diplomatic connections. Better resourced countries may send different people for different parts of the agenda, reflecting individual areas of expertise; more often, a single delegate will attend throughout. Where delegates are sent from home nations, WIPO meetings offer a useful opportunity to network and hold bilateral meetings.

Member States organise themselves into regions to facilitate participation in meetings:
- Africa
- Group of Latin American and Caribbean countries (GRULAC)
- Asia-Pacific
- Group B, comprising, in broad terms, developed countries, named after the room in which they meet in WIPO’s building: UK US, Australia, Canada, Japan and the EU
- Central Europe and Baltic States Group
- Central Asia, Caucasus and Eastern Europe (CACEEC), and
- China.

Each group has a rotating coordinator position, with coordinators playing a key role in liaising with the Secretariat, and coordinating positions. The EU also speaks as a group, with the Commission or the rotating presidency taking the floor. In some situations, only group coordinators will take the floor, although all Member States have the right to speak. Observers, such as NGOs, will be invited to
speak only if the Chair approves, and often are given less time to speak. Committees themselves can agree on different types of action, including research, information gathering, or the development of tools. The outcomes sit alongside work carried out directly by the Secretariat as part of the Program of Work and Budget.

WIPO’s Secretariat is based in Geneva, with regional offices around the world. WIPO has a projected income of CHF 951.8 million (just over USD 1 billion) over the two years 2022–23, and an expenditure of CHF 793.8 million (just over USD 859.2 million) (WIPO 2021, 4). Over 95% of the income comes from fees for services such as patent registrations, with the remainder from assessed contributions from Member States. The organisation has a degree of independence compared to other UN entities which are more reliant on government membership contributions.

Within WIPO’s central organisational structure, the branch most engaged on issues related to copyright for libraries is the Copyright and Creative Industries Sector. The Sector comprises a Copyright Law Division which acts as a secretariat to SCCR and supports the implementation of Treaties, a Copyright Management Division focused on capacity building in support of collective management, and a Copyright Development Division which works on capacity building and other programmes with developing countries. The Sector also includes the Information and Digital Outreach Division taking the lead on communications for WIPO as a whole, and WIPO Awards.

Discussions on Exceptions and Limitations at WIPO

Historically, while L&Es have been part of copyright discussions since the Berne Convention, countries have been left to develop their own provisions. At the international level, there has been some evolution, notably with the introduction of the three-step test during the Stockholm Revision of the Berne Convention (Love 2012), but the optional character of exceptions in general, excluding quotation, has remained constant.

As already noted, it became clear over time that leaving decision-making about exceptions to the national level had disadvantages. Governments seeking only to comply with international law risked neglecting exceptions and core provisions for libraries and others were unevenly taken up around the world. Librarians, teachers, researchers and others enjoyed broader provisions in some jurisdictions than in others. An early focus responding to the situation was the exploration of the effects of exclusive rights on the ability of people with disabilities to access in-copyright works. In 1981, UNESCO and WIPO set up a Working
Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright, addressing the issue of L&Es allowing the making and sharing of accessible format copies internationally (Berne Union 1982).

Despite some steps towards reform, there remained little focus internationally on L&Es, with the WIPO Copyright Treaty of 1996 notably simply permitting the extension of existing provisions into the digital environment:

Agreed statement concerning Article 10: It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment (WIPO 1996).

Similarly, when SCCR was set up in 1998, it focused purely on performers’ and broadcasters’ rights, leading to the 2012 Beijing Treaty on Audiovisual Performances and the unfinished Broadcasting Treaty (WIPO SCCR 1998). It was only at its ninth meeting, in 2003, that SCCR discussed a paper about limitations and exceptions in the digital age, prepared by Professor Sam Ricketson (Ricketson 2003). It raised questions about the application of existing laws to different digital uses, including by libraries and educators. Between 2004 and 2006, momentum grew for the topic of L&Es to be added to the agenda as a standard item at SCCR (Crews 2008; Garnett 2006; Sullivan 2007; WIPO SCCR 2009), with Chile in particular leading the efforts (WIPO SCCR 2004; 2005b). Chilean delegates called for an approach made up of three elements:

- Identification, from the national intellectual property systems of Member States, of national models and practices concerning exceptions and limitations
- Analysis of the exceptions and limitations needed to promote creation and innovation and the dissemination of developments stemming therefrom, and
- Establishment of agreement on exceptions and limitations for purposes of public interest that must be envisaged as a minimum in all national legislations for the benefit of the community; especially to give access to the most vulnerable or socially prioritized sectors (WIPO 2004, 1).

By the sixteenth session of SCCR in March 2008, it was accepted that exceptions and limitations should have their own standalone agenda item. Chile was joined by Brazil, Nicaragua and Uruguay in setting out plans to work on L&Es for educational activities, people with disabilities, libraries and archives, and the promotion of technological innovation, with the first three becoming increasingly
clearly defined as categories on which work would be carried out (WIPO SCCR 2008).

In the following years, the SCCR followed a pattern of commissioning studies into different aspects of the situation around L&Es in different countries, the first pillar of the proposal. The studies included reports prepared by Professor Kenneth Crews into limitations and exceptions for libraries (Crews 2008; 2015; 2017; 2019), as well as similar efforts for persons with print disabilities (Sullivan 2007); education (Fometeu 2009; Xalabarder 2009; Monroy Rodríguez 2009; Nabhan 2009; Seng 2016; Seng 2017); and museums (Canat, Guibault, and Logeais 2015). The studies have been descriptive, focusing on making sense of the laws currently in place from one country to the next, rather than judging how appropriate one approach or the other might be.

The other two pillars of Chile’s original proposals, namely the exploration of the L&Es needed to promote innovation and creativity, and concrete proposals for minimum L&Es needed globally, have proved more contentious. The question of the form that any resulting instrument or output should take has overlapped with, and coloured, the wider discussion about substance.

The African Group took the lead in proposing a draft Treaty on Persons with Disabilities, Educational and Research Institutions, Libraries and Archives (WIPO SCCR 2010a; 2011a), while Brazil, Ecuador and Uruguay provided text in 2011 as a basis for a Treaty. The documents focused on a minimum set of L&Es to be adopted by all governments, with the African Group proposal highlighting in particular the need for the possibility of importing and exporting works to fulfil the proposed Treaty’s goals (WIPO SCCR 2011b; 2012a). The 2012 Brazilian, Ecuadorian and Uruguayan education proposals simply took the language from the Agreed Statement of the WIPO Copyright Treaty which allows Member States to extend analogue exceptions to the digital world, and make such digital exceptions mandatory for educational purposes. The proposals for libraries and archives however highlighted the need for exceptions for lending, reproduction and distribution, as well as provisions on circumventing technological protection measures, and limiting liability for mistakes made in good faith.

In the meanwhile, others, notably the US and the EU argued both broadly in favour of maintaining rights, and particularly against moves towards a Treaty or any form of law that could compel changes. For example, the proposal for the EU included a recommendation rather than anything more binding on L&Es for people with print disabilities (WIPO SCCR 2010b), and the US document focused on objectives and principles (WIPO SCCR 2011c; 2014). In 2012, the Secretariat brought suggestions made to that date together into a single document, containing all submitted textual suggestions on the subject of libraries and archives (WIPO SCCR 2012b).
Together the various documents helped clarify the different positions broadly taken on the subject of L&Es. On the one hand, a shifting coalition of developing countries called for an international instrument which would both mandate a basic set of exceptions in every country and allow for their use across borders; and on the other hand, developed countries argued that there was no need for change to international law, with soft law, principles or simply guidelines being sufficient. It is worth emphasising that by this time strong progress was being made on the specific issue of L&Es for persons with print disabilities. Much work focused on the area, with efforts on other parts of the L&Es agenda voluntarily delayed to optimise the chances for successful outcomes related to print disabilities. The work was capped by the diplomatic conference at which the Marrakesh Treaty was signed in 2013.

With the Marrakesh Treaty in sight, Member States nonetheless recognised that work remained on the L&Es agenda. The General Assembly endorsed the recommendation “that the SCCR continue discussion to work towards an appropriate international legal instrument or instruments (whether model law, joint recommendation, treaty and/or other forms), with the target to submit recommendations on L&Es for libraries and archives to the General Assembly by the 28th session of the SCCR”. A similar recommendation was made regarding educational and research institutions and persons with other disabilities although the target date for completion was the 30th session of the SCCR (WIPO General Assembly 2012, 4).

Despite the commitment to arrive at proposals in time for the 28th session held in 2014, the SCCR instead returned to the previous deadlock, with blocs of countries arguing both for and against the merits of binding international action. Following a restatement of existing positions (WIPO SCCR 2013a; 2013b), and with little sign of a way to resolve disagreements, but a proclaimed desire on all sides to see work on L&Es advance, the focus turned to exploring ways in which the substantive issues on the table could be explored without raising opposition.

Across a series of meetings, the SCCR discussed concrete provisions in eleven different areas for libraries and archives: preservation, lending, reproduction, legal deposit, parallel importation, cross-border uses, orphan works, limitations on liability, technological protection measures, contract override, and translation, based on a set of topics proposed by the African Group, Brazil, Ecuador, India and Uruguay. In 2017, the Chair of the SCCR, Martin Moscoso of Peru, proposed a Chair’s chart for libraries and archives, and for educational and research establishments (Moscoso 2017a and 2017b).

The charts attempted to find a middle way between the proposals made by the different sides. Views expressed in the charts included both relatively strong assertions about the need for exceptions in certain areas, notably preservation
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and lending, but also a focus on ensuring that any change to existing rights would not cause unjustified prejudice to rightsholders including cross-border uses. The charts take a strong position in favour of introducing limitations on liability for libraries and archives, and of enabling circumvention of technological protection measures when they prevent enjoyment of L&Es.

Even after this work, Member States remained unable to agree on a way forward. An Argentinian proposal for the structure of a possible instrument relating to L&Es, which would combine a minimum set of exceptions at the national level, and provisions allowing for works to be used across borders through a country of origin principle, also saw little take-up by delegations (WIPO SCCR 2016).

In 2015–16 the International Council of Museums joined the coalition already formed by libraries and archives, aligning itself with the agenda being pursued by library and archive organisations.

The next effort to find a way forward, under the guidance of the incoming Chair, Daren Tang of Singapore (who subsequently became Director General in 2020), and the Secretariat, was to develop action plans which could find a way around the continued deadlock on the question of the form of any end-product of reform discussions. The plans included both the development of typologies, aimed at providing a way of defining the different choices that lawmakers could make in elaborating L&Es which were presented at the 38th meeting of SCCR in 2019, with, for example, a typology of libraries prepared by Kenneth Crews (Crews 2019). A series of workshops was held in Singapore in April, Nairobi in June, and the Dominican Republic in July of 2019. The workshops concluded with an International Conference on Copyright Limitations and Exceptions for Libraries, Archives, Museums and Educational & Research Institutions in October 2019 (IFLA 2019c).

The various discussions and sessions, as well as the typologies, focused strongly on the state of the laws in place in 2019. As such, they offered primarily an opportunity to highlight the disparities in the provisions, and to engage Member State representatives in reflection on the legal situation for libraries, archives, museums, education and research, although some participants called for stronger action to promote exceptions, while others advocated for licensing as a solution to challenges encountered.

The results of the three workshops were summarised in the international conference. Member States heard summaries of the discussions held at the workshops, and started to broach the subject of next steps. The particular importance of action to bring about preservation exceptions globally and to enable digital and cross-border uses was highlighted, although with a strong presence of repre-
sentatives from collective management organisations on each panel, there were also voices in favour of promoting licensing as the sole necessary solution.

A report of the workshops and the international conference included a list of suggestions for future work and reflected the summing up by the Deputy Director General of WIPO at the close of the international conference (WIPO SCCR 2020a, 72–74). The suggestions included a continued need to focus on protecting rights and a collective approach to facilitate cross-border access. The report recognised the potential value of legal instruments at the international level, but placed a primary focus on providing information and technical support for reforms nationally, through a buffet of options for reform.

Looking Ahead – the Future SCCR Agenda

Progress towards concrete reforms at WIPO is slow, although not necessarily slower on L&Es than in any other area. Speeches by WIPO’s previous Director General indicated a degree of frustration with the pace, but also pointed to failures to reach agreement at a global level in other areas as evidence of a wider problem with finding consensus (WIPO 2020). Different negotiations are often interconnected politically, if not in terms of substance, and progress on one question might be dependent on progress, or a lack of it, in a completely different area.

Nonetheless, the work undertaken has led to a greater awareness of the situation of libraries, archives, museums, educators and researchers than might have been the case otherwise, with vocal support from many Member States for action. It has opened up possibilities for library advocates to engage directly with governments in ways that might not otherwise have been possible, in meetings both in Geneva, and in national capitals throughout the world.

Since 2019, the COVID-19 pandemic has had a major impact on committee work in WIPO, with Member States taking a particularly hard line against continuing discussions in virtual form, even as other UN agencies have advanced their work in person. The report of the regional workshops and international conference was published in 2020, but not extensively discussed at the one meeting of SCCR that took place that year, or at the meeting held in June–July 2021. At the time of writing, the dates of the next meeting of the SCCR are not known, but it has been agreed that the meeting will include a half-day discussion about the impacts of the pandemic on the cultural, creative and educational ecosystem, including copyright, related rights, and L&Es.

The topic of L&Es for libraries and archives and, implicitly, museums, as well as for educational and research institutions and persons with other disabilities,
will be on the agenda. However, how substantive discussions will be, and how much they can advance, will depend on the willingness of those who are more favourable to action to make concrete proposals for work, as well as the readiness of those who have tended to be more reticent in the past to be more open and not block ideas.

A proposal for a new action plan may emerge, drawing on the suggestions made in the report of the 2019 regional workshops and the international conference. Some Member States may seek to promote international instruments; others may focus on soft law approaches; and others may wish merely to continue information exchange and evidence gathering. A practical step may be to focus on guidance and options for national reforms which could, at least, lead to some changes and clarify the need for complementary international reforms.

A further factor will be the progress of other items on the agenda at SCCR. Debates on a Broadcasting Treaty continue, with a proposal due from an informal grouping of Member States. On this topic, libraries, along with like-minded parties, have questioned the need for a Treaty, and highlighted the risks of creating additional rights without appropriate exceptions (KEI 2019).

The list of Other Items to be addressed at the end of the SCCR agenda has grown. While topics such as rights for theatre directors, resale rights and distribution of copyright incomes in a digital environment are only tangentially relevant for libraries, work on them takes time which then cannot be spent on advancing work on L&Es. More relevant for libraries is the proposal by Sierra Leone, Malawi and Panama in 2020 to carry out a study on Public Lending Right (WIPO SCCR 2020b). While any decision has been delayed so far due to COVID-19, the proposal is arguably one-sided, focusing only on the benefits of Public Lending Right, rather than its disadvantages, and instead of waiting for the results of an evaluation, prematurely seeks recommendations on the implementation of such schemes in developing countries. At its next meeting, SCCR is likely to decide what to do about the proposal.

The impact of COVID-19 will be felt, not just in the logistics around the meeting, but also in the substance of the discussions. The half-day session planned for the next SCCR meeting is likely to provide an opportunity to underline that the pandemic has supported the need to ensure that libraries, archives, museums, educators and researchers can continue to rely on L&Es in a digital environment. Yet it will also provide an opening for questions about the revenues of creators, in particular from major internet platforms. Other emerging issues will no doubt be the discussions taking place elsewhere about how to deal with platforms, and in particular the value gap (De Cock 2017) rhetoric seen elsewhere. Finally, there is the ongoing question of what will happen with the persons with other disabilities pillar of the wider work programme on L&Es. There remains
support from some Member States for action, yet it is unclear what the action might be. One option is a protocol or other text extending the application of the Marrakesh Treaty to all people with other disabilities, and the individuals and institutions that support them.

Conclusion

The World Intellectual Property Organization and the Treaties it oversees are a key part of the copyright landscape. They set broad parameters for national laws, both in terms of minimum protections to be offered to creators, create options, and in the case of the Marrakesh Treaty, obligations, to develop exceptions or other provisions to ensure user rights. The content of WIPO Treaties often filters into trade deals and other laws, or Treaty implementation is made part of such texts, making them more directly enforceable. WIPO through its capacity building work, as well as other activities, has a prominent role in shaping national copyright laws and administration. Influencing the work of WIPO therefore carries the potential to shape the laws that libraries face when working with copyright materials.

International negotiations are inevitably slow; results are not quick or easy. There is the need to reckon with opposition to anything that may require domestic reform, as well as a more fundamental sensitivity to the concept of exceptions to exclusive rights in the first place. WIPO is a logical focus for organisations and interests focused on promoting stronger intellectual property rights and enforcement, rather than the flexibilities created by L&Es, and it can certainly feel to reformers that efforts concentrating on the interests of users face strong headwinds.

The coming years are likely to continue to see discussion about both the substance of reform on L&Es, that is the activities to be included, as well as the form any change might take, through international law or other means. The impact of COVID-19 on the ability of libraries, schools and other institutions to fulfil their missions will be part of the picture, and may help underline the case for ensuring that L&Es apply to both digital and analogue uses. Concerns among rightsholders of losing out to internet platforms in the distribution of revenues may also come to take a more explicit role in the debate. In practical terms, it seems that a new round of evidence gathering and meetings is likely, potentially with the development of tools that focus primarily on supporting national decision-making which could contain the seed of future international action, rather than enabling cross-border cooperation directly.
For all the difficulty faced in ensuring progress through WIPO, no other forum offers the same potential for the development of treaties or other instruments which can both drive national reform and enable international cooperation. UNESCO has a strong emphasis on the work of libraries, as well as that of archives, museums, educators and researchers. The UNESCO Recommendation Concerning the Preservation of, and Access to, Documentary Heritage Including in Digital Form and accompanying implementation guidelines have been noteworthy achievements. However, UNESCO has tended to focus less strongly on copyright in recent years, and relies on persuasion rather than enforcement of the rules it oversees.

Trade negotiations, and in particular the World Trade Organization, have stronger enforcement mechanisms. However, at least at the global level, the WTO has faced similar challenges in terms of difficulties in securing agreement. Trade organisations are less focused on intellectual property, which can be seen as a bargaining chip alongside other issues, and they are considerably less open to civil society participation. Bilateral and plurilateral trade deals can deliver changes which strengthen the case for L&Es (Band 2020b), but are often carried out with little civil society contribution or oversight. Other fora have only a narrow focus, for example the World Health Organization which concentrates on intellectual property associated with medicines.

Notwithstanding the slow pace of work at WIPO, it continues to offer a relatively open space for civil society organisations to engage directly with governments on the topic of L&Es to copyright for libraries, as well as the provision of further research, tools and even international law that would help bring about adequate copyright frameworks. Engagement in WIPO, is a key part of any comprehensive effort by the library field to influence the shape of copyright laws and practices globally, complementing efforts at national and regional levels.

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